A

KETUA PENGARAH JABATAN PENYIARAN MALAYSIA & ANOR v. VERTEX BLUE CONSULTING SDN BHD

FEDERAL COURT, PUTRAJAYA
ABU BAKAR JAIS PCA
HASNAH MOHAMMED HASHIM CJ (MALAYA)
B VAZEER ALAM MYDIN MEERA FCJ
[CIVIL APPEAL NO: 01(f)-4-02-2025(W)]
12 NOVEMBER 2025

C **Abstract** – *(i) A default judgment in the form of a declaration typically cannot be made without the court considering the merits of the case. For declaratory relief, the court will require some level of scrutiny of the merits of the claim before making the order. Courts generally do not grant declaratory relief in default without an evidential basis and argument to support the claim, as doing so without the court's sanction and review* D *of the facts may be seen as a denial of procedural fairness; (ii) In the absence of supporting evidence, a trial judge is not bound by the terms of the court order to grant a default judgment on the basis of mere non-compliance of the said order*

E ***CIVIL PROCEDURE:*** *Judgments and orders – Peremptory order – Unless order – Non-compliance – Whether resulted in defence and counterclaim being struck out – Whether trial judge bound by terms of order to grant default judgment on basis of non-compliance – Whether default judgment containing declaratory order made without benefit of evidence – Whether default judgment in form of declaration could* F *be made without court considering merits of case – Whether declaratory reliefs require level of scrutiny of merits of claim before making order – Whether proper judgment on merits*

CIVIL PROCEDURE: *Judgments and orders – Default judgment – Whether trial* G *judge bound by terms of order to grant default judgment on basis of non-compliance – Whether default judgment containing declaratory order made without benefit of evidence – Whether default judgment in form of declaration could be made without court considering merits of case – Whether declaratory reliefs require level of scrutiny of merits of claim before making order – Whether proper judgment on merits*

H The respondent ('plaintiff') was in the business of providing advertising and media services. The plaintiff was the successful bidder in a tender exercise conducted by RTM to appoint an independent sales agent to carry out the sales of the advertising time slots for its TV2, TVOkey and 33 radio stations ('tender exercise'). RTM was under the purview of the defendants/appellants I ('defendants'). The parties then entered into a concession agreement for a period of five years. The plaintiff claimed that the defendants, in breach of

the contract, had wrongfully terminated the concession agreement. Thus, the plaintiff filed a suit in the High Court seeking, *inter alia*, a declaration that the concession agreement was wrongly terminated, and claimed damages based on losses it had allegedly suffered. The defendants denied that there was breach of contract and alleged that it was the plaintiff who had in fact breached the concession agreement by failing to pay the contractually guaranteed minimum sum. Thus, the defendants contended that the termination of the agreement was lawful, and counterclaimed the sum of RM43,482,881.27 as damages. At the High Court, the plaintiff filed applications under the Rules of Court 2012 ('ROC') for discovery of documents. A consent order for general discovery was recorded and the specific discovery application was granted. The defendants cooperated and gave discovery of the documents sought. However, the plaintiff complained that the defendants' compliance with both orders was incomplete and unsatisfactory. Consequently, the plaintiff filed a further discovery application, seeking additional documents. This application was granted ('order'). In the order, para. 6 was an unless order ('unless order'). As specified in the said para. 6 of the order, non-compliance by the defendants would result in their defence and counterclaim being struck out without further order of the court. In such event, judgment would be entered in favour of the plaintiff in accordance with the plaintiff's statement of claim. Subsequently, although further documents were provided, the plaintiff contended that the defendants were still in breach of the order by failing to fully comply with its terms. Thus, on the first day of trial the plaintiff sought an adjournment, and when it was not allowed by the court, counsel then raised the issue of the defendants' non-compliance of the order and sought default judgment as per the terms of para. (6) of the order. The High Court Judge ('HCJ'), in ordering for a declaration that the termination of the concession agreement was unlawful, held that the defendants' failure to comply with the order led to the automatic striking out of their defence and counterclaim. The HCJ held that a peremptory order must be strictly adhered to, and non-compliance would result in the striking out of the action. The Court of Appeal, in affirming the decision of the High Court, held, *inter alia,* (i) the High Court's judgment was correctly based on para. 6 of the order, which was a 'self-executing order', meaning that upon non-compliance, the defendants' defence and counterclaim would be struck out automatically and judgment would be entered for the plaintiff; (ii) the defendants failed to legally challenge the validity or effect of the 'self-executing' unless order, and thus the appeal was found to be without merit; and (iii) the High Court had correctly applied the law in striking out the defence and entering judgment for the plaintiff. The Federal Court granted leave to the defendants to appeal on one question of law, namely: whether the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge when the unless order has the similar effect as though a summary judgment or judgment

A B C D E F G H I

in default was entered against the appellants wherein it fails to comply with the provision of O. 73 of the ROC and s. 42 of the Government Proceedings Act 1956 ('GPA').

Held (allowing appeal)
Per Vazeer Alam Mydin Meera FCJ (for the majority):

(1) A default judgment in the form of a declaration typically cannot be made without the court considering the merits of the case. Unlike claims for a fixed amount of money, where default is an admission of the debt, claims for non-monetary relief like declarations are discretionary. Courts generally do not grant declaratory relief in default without an evidential basis and argument to support the claim, as doing so without the court's sanction and review of the facts may be seen as a denial of procedural fairness. In essence, the court acts as a safeguard when a claimant seeks a declaration *via* default or summary judgment, requiring a substantive review to ensure the relief is appropriate and just, rather than simply rubber-stamping the request. (para 17)

(2) Declarations are a form of specific relief, which is subject to the court's discretion, even if the defendant has not responded to the claim. A standard default judgment is not considered a judgment 'on the merits' in the sense of a full trial. Thus, for declaratory relief, the court will require some level of scrutiny of the merits of the claim before making the order. The claimant must provide evidence of the factual matrix to enable a judge to exercise his discretion properly. The court needs to be satisfied that the claimant's case is a fit one for granting the specific relief sought. If a default judgment is entered irregularly (without following proper procedure), it can be set aside as a matter of right. (para 18)

(3) In the present case, the default judgment containing the declaratory order was made without the benefit of any evidence on which the High Court could have properly exercised its discretion. Hence, the default judgment granted summarily was not a proper judgment on its merits. Hence, to that extent, the Court of Appeal and the High Court had fallen into error. The judgment of the High Court was irregular, and the Court of Appeal's affirmation of that judgment was wrong in law. In the circumstance, in the absence of any supporting evidence, the trial judge was not bound by the terms of the order to grant default judgment on the basis of mere non-compliance of the order. In the circumstance of the facts of this case, the leave question was answered in the negative. (paras 21-23)

Per Abu Bakar Jais FCJ (dissenting):

(1) The order could not be equated as summary judgment. The order made had a clear distinction compared to a summary judgment. The order was made as a preliminary direction given for the disclosure of the documents before full trial. While a summary judgment is granted by evaluating the pleadings to conclude there is no defence to the claim filed. The order was made even before the need to evaluate the defence. The non-compliance with the terms of the order by the defendants resulted in judgment being entered against them. It did not require the evaluation of the defence. The defendants were in error to consider the order as similarly as a summary judgment. It could not be correct law to say the defendants were absolved from liability because they are Government entities and as such, no judgment could be entered against them as it amounted to summary judgment against the Government in this case. The judgment must be entered against the defendants as they had simply disobeyed the order which included the unless order. It had no nexus with a summary judgment. (paras 53 & 54)

(2) The action of the defendants in not complying with the terms of the order was quite clear. If the unless order is not given effect, the defendants not only could avoid obligation to disclose the documents but also has the effect of allowing the defendants to ignore the directions of the courts. This, among others, would directly hamper and frustrate the ability for courts to issue directions to properly manage the case before the trial as provided by O. 34 of the ROC for pre-trial case management. There could be no doubt that the order was a binding court order issued in the ordinary course of proceedings. The order thus must be obeyed and any judgment or ruling to the contrary would not only invite disrespect to directions issued by the courts by such orders but also gives the damaging impression that there were instances that court orders need not be complied with. (paras 55 & 56)

(3) Herein, not only the order was not set aside in any proceedings but the defendants also did not appeal against the grant of the same. The effect of not appealing meant that the defendants accepted the terms of the order. The unless order contained in the order itself was also unambiguous in stating if the order was not adhered to, the defendants' amended defence and counterclaim 'shall stand struck out without further order of court and the action herein shall be adjudged in the plaintiff's favour'. Thus, it was self-executing in nature and the failure to comply with the order, should mean the defendants must face the consequences and penalty that accordingly ensued. (paras 57 & 58)

(4) The order was made pursuant to an application from the plaintiff by virtue of O. 24 of the ROC for the discovery of the documents. This provision is specific in nature. This was in contrast to O. 73 of the ROC which is more of a general provision relied by the defendants on proceedings by and against the government. Hence, the principle of '*generalia specialibus non derogant*' ('general things do not detract from special things') would thus apply against the defendants. In this sense, the application regarding the disclosure of the documents must take precedence over the issue of whether summary judgment had been entered against the defendants. (para 59)

(5) Section 42 of the GPA would not assist the defendants in the present appeal as the order is a specific order about the requirement to disclose the documents and has no or little connection with a summary judgment. The non-compliance of the order itself and the court's direction regarding the documents resulted in judgment being entered against the defendants and not because there were no merits to the defence and counterclaim of the defendants. (para 60)

Bahasa Melayu *Headnotes*

Responden ('plaintif') menjalankan perniagaan menyediakan perkhidmatan pengiklanan dan media. Plaintif berjaya membida dalam tender yang dijalankan oleh RTM untuk melantik ejen jualan bebas untuk menjalankan penjualan slot masa pengiklanan untuk TV2, TVOkey dan 33 stesen radio ('pelaksanaan tender'). RTM adalah bawah bidang kuasa defendan/perayu ('defendan-defendan'). Pihak-pihak kemudiannya memeterai perjanjian konsesi untuk tempoh lima tahun. Plaintif mendakwa bahawa defendan-defendan, yang melanggar kontrak, telah secara salah menamatkan perjanjian konsesi. Oleh itu, plaintif memfailkan saman di Mahkamah Tinggi memohon, antara lain, pengisytiharan bahawa perjanjian konsesi telah ditamatkan secara salah, dan menuntut ganti rugi berdasarkan kerugian yang didakwa dialaminya. Defendan-defendan menafikan bahawa terdapat perlanggaran kontrak dan mendakwa bahawa plaintif yang sebenarnya telah melanggar perjanjian konsesi kerana gagal membayar jumlah minimum yang dijamin secara kontrak. Oleh itu, defendan-defendan menghujahkan bahawa penamatan perjanjian itu adalah sah, dan menuntut balas jumlah RM43,482,881.27 sebagai ganti rugi. Di Mahkamah Tinggi, plaintif memfailkan permohonan bawah Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk penzahiran dokumen. Perintah persetujuan untuk penzahiran umum telah direkodkan dan permohonan penzahiran khusus telah diberikan. Defendan-defendan memberi kerjasama dan memberikan penzahiran dokumen yang diperlukan. Bagaimanapun, plaintif mengadu bahawa pematuhan defendan-defendan terhadap kedua-dua perintah adalah tidak lengkap dan tidak memuaskan. Akibatnya, plaintif memfailkan permohonan

penzahiran lanjut, mendapatkan dokumen tambahan. Permohonan ini dibenarkan ('perintah'). Dalam perintah, perenggan 6 ialah perintah melainkan ('perintah melainkan'). Seperti yang dinyatakan dalam perenggan 6 perintah tersebut, ketidakpatuhan defendan-defendan akan menyebabkan pembelaan dan tuntutan balas mereka dibatalkan tanpa perintah mahkamah selanjutnya. Dalam keadaan sedemikian, penghakiman akan dimasukkan berpihak pada plaintif mengikut pernyataan tuntutan plaintif. Selepas itu, walaupun dokumen lanjut telah disediakan, plaintif menghujahkan bahawa defendan-defendan masih melanggar perintah dengan kegagalannya mematuhi terma sepenuhnya. Oleh itu, pada hari pertama perbicaraan plaintif memohon penangguhan, dan apabila itu tidak dibenarkan oleh mahkamah, peguam kemudian membangkitkan isu ketidakpatuhan defendan-defendan terhadap perintah dan memohon penghakiman ingkar mengikut terma perenggan (6) perintah. Hakim Mahkamah Tinggi ('HMT'), dalam memerintahkan pengisytiharan bahawa penamatan perjanjian konsesi adalah menyalahi undang-undang, berpendapat bahawa kegagalan defendan-defendan untuk mematuhi perintah itu menyebabkan pembelaan dan tuntutan balas mereka secara automatik dibatalkan tanpa perintah mahkamah selanjutnya. Hakim Mahkamah Tinggi berpendapat bahawa perintah peremptori mesti dipatuhi dengan ketat, dan ketidakpatuhan akan mengakibatkan tindakan itu dibatalkan. Mahkamah Rayuan, dalam mengesahkan keputusan Mahkamah Tinggi, memutuskan, antara lain (i) penghakiman Mahkamah Tinggi adalah betul berdasarkan perenggan 6 perintah, yang adalah 'perintah laksana sendiri', bermakna apabila terdapat tiada pematuhan, pembelaan dan tuntutan balas defendan-defendan akan dibatalkan secara automatik dan penghakiman akan dimasukkan berpihak pada plaintif; (ii) defendan-defendan gagal mencabar kesahihan atau kesan 'laksana sendiri' perintah melainkan, dan dengan itu rayuan didapati tanpa merit; dan (iii) Mahkamah Tinggi telah menggunakan undang-undang dengan betul dalam membatalkan pembelaan dan memasukkan penghakiman untuk plaintif. Mahkamah Persekutuan memberi kebenaran pada defendan-defendan untuk merayu atas satu persoalan undang-undang, iaitu: sama ada hakim bicara terikat dengan perintah melainkan yang diumumkan oleh hakim prosiding interlokutori apabila perintah melainkan mempunyai kesan yang sama seolah-olah penghakiman terus atau penghakiman ingkar telah dimasukkan terhadap perayu apabila gagal mematuhi peruntukan A. 73 KKM dan s. 42 Akta Prosiding Kerajaan 1956 ('APK').

Diputuskan (membenarkan rayuan)
Oleh Vazeer Alam Mydin Meera HMP (keputusan majoriti):

(1) Penghakiman ingkar dalam bentuk pengisytiharan biasanya tidak boleh dibuat tanpa mahkamah mempertimbangkan merit kes itu. Tidak seperti tuntutan untuk jumlah wang tetap, di mana kemungkiran adalah pengakuan hutang, tuntutan untuk relif bukan kewangan seperti pengisytiharan adalah mengikut budi bicara. Mahkamah secara amnya

tidak memberikan relief pengisytiharan secara ingkar tanpa asas bukti dan hujah untuk menyokong tuntutan itu, kerana perbuatan demikian tanpa kebenaran mahkamah dan semakan fakta boleh dilihat sebagai penafian keadilan prosedur. Pada dasarnya, mahkamah bertindak sebagai perlindungan apabila pihak yang menuntut mendapatkan pengisytiharan melalui penghakiman ingkar atau ringkas, yang memerlukan semakan substantif untuk memastikan relief itu sesuai dan adil, dan bukannya sekadar meluluskan permintaan itu tanpa pertimbangan.

(2) Pengisytiharan adalah satu bentuk relif khusus, yang tertakluk pada budi bicara mahkamah, walaupun defendan tidak menjawab tuntutan itu. Penghakiman ingkar 'standard' tidak dianggap sebagai penghakiman 'atas merit' dalam erti kata perbicaraan penuh. Oleh itu, untuk relief pengisytiharan, mahkamah akan memerlukan beberapa tahap penelitian terhadap merit tuntutan sebelum membuat perintah. Pihak yang menuntut mesti memberikan bukti matriks fakta untuk membolehkan hakim menggunakan budi bicaranya dengan betul. Mahkamah perlu berpuas hati bahawa kes pihak yang menuntut adalah sesuai untuk pemberian relief khusus yang diminta. Jika penghakiman ingkar dimasukkan secara tidak teratur (tanpa mengikut prosedur yang betul), itu boleh diketepikan.

(3) Dalam kes ini, penghakiman ingkar yang mengandungi perintah pengisytiharan telah dibuat tanpa faedah sebarang bukti yang Mahkamah Tinggi boleh menggunakan dengan budi bicaranya dengan betul. Oleh itu, penghakiman ingkar yang diberikan secara ringkas bukanlah penghakiman yang wajar berdasarkan meritnya. Setakat itu, Mahkamah Rayuan dan Mahkamah Tinggi telah terkhilaf. Penghakiman Mahkamah Tinggi adalah tidak teratur, dan pengesahan Mahkamah Rayuan terhadap penghakiman itu adalah salah di sisi undang-undang. Dalam keadaan itu, jika tiada apa-apa bukti sokongan, hakim bicara tidak terikat dengan terma perintah untuk memberikan penghakiman ingkar atas dasar ketidakpatuhan perintah semata-mata. Dalam keadaan fakta kes ini, soalan kebenaran dijawab secara negatif.

Oleh Abu Bakar Jais HMP (menentang):

(1) Perintah itu tidak boleh disamakan sebagai penghakiman terus. Perintah yang dibuat mempunyai perbezaan yang jelas berbanding dengan penghakiman terus. Perintah itu dibuat sebagai arahan awal yang diberikan untuk pendedahan dokumen sebelum perbicaraan penuh. Manakala penghakiman terus diberikan dengan menilai pliding untuk membuat kesimpulan tiada pembelaan terhadap tuntutan yang difailkan. Perintah itu dibuat sebelum keperluan untuk menilai pembelaan.

Ketidakpatuhan terma perintah oleh defendan-defendan menyebabkan penghakiman dibuat terhadap mereka. Ini tidak memerlukan penilaian pihak pembelaan. Defendan-defendan terkhilaf apabila menganggap perintah itu sama seperti penghakiman terus. Adalah bukan undang-undang yang betul untuk mengatakan defendan-defendan telah dibebaskan daripada liabiliti kerana mereka adalah entiti Kerajaan dan oleh itu, tiada penghakiman boleh dibuat terhadap mereka kerana itu adalah penghakiman terus terhadap Kerajaan dalam kes ini. Penghakiman mesti dibuat terhadap defendan-defendan kerana mereka mengingkari perintah yang termasuk perintah melainkan. Ini tidak mempunyai hubungan dengan penghakiman ringkas.

(2) Tindakan defendan-defendan tidak mematuhi terma perintah itu agak jelas. Sekiranya perintah melainkan tidak dikuatkuasakan, defendan-defendan bukan sahaja boleh mengelakkan kewajipan untuk mendedahkan dokumen tetapi juga mempunyai kesan membenarkan defendan-defendan mengabaikan arahan mahkamah. Ini antara lain, secara langsung akan menghalang dan menggagalkan keupayaan mahkamah mengeluarkan arahan untuk menguruskan kes dengan betul sebelum perbicaraan seperti yang diperuntukkan oleh A. 34 KKM untuk pengurusan kes pra-perbicaraan. Tidak dinafikan bahawa perintah itu adalah perintah mahkamah yang mengikat yang dikeluarkan dalam perjalanan prosiding biasa. Oleh itu, perintah itu mesti dipatuhi dan apa-apa penghakiman atau keputusan yang bertentangan bukan sahaja akan mengundang rasa tidak hormat kepada arahan yang dikeluarkan oleh mahkamah melalui perintah sedemikian tetapi juga memberi gambaran yang memudaratkan bahawa perintah mahkamah tidak perlu dipatuhi.

(3) Di sini, bukan sahaja perintah itu tidak diketepikan dalam mana-mana prosiding tetapi defendan-defendan juga tidak merayu terhadap pemberian yang sama. Kesan tidak merayu bermakna defendan-defendan menerima syarat perintah. Perintah melainkan yang terkandung dalam perintah itu sendiri juga jelas dalam menyatakan jika perintah itu tidak dipatuhi, pembelaan dan tuntutan balas defendan yang dipinda 'akan terhenti tanpa perintah mahkamah selanjutnya dan tindakan di sini akan diputuskan memihak kepada plaintif'. Oleh itu, itu bersifat melaksanakan sendiri dan kegagalan untuk mematuhi perintah, sepatutnya bermakna defendan-defendan mesti menghadapi akibat dan penalti yang sewajarnya berlaku.

(4) Perintah itu dibuat menurut permohonan plaintif berdasarkan A. 24 KKM untuk penzahiran dokumen. Peruntukan ini bersifat khusus. Ini berbeza dengan A. 73 KKM yang lebih kepada peruntukan am yang disandarkan oleh defendan pada prosiding oleh dan terhadap kerajaan. Prinsip '*generalia specialibus non derogant*' ('general things do not detract from special things') dengan itu akan terpakai terhadap defendan-

defendan. Dalam pengertian ini, permohonan penzahiran dokumen mesti diutamakan daripada isu sama ada penghakiman terus telah dimasukkan terhadap defendan-defendan.

(5) Seksyen 42 APK tidak akan membantu defendan-defendan dalam rayuan ini kerana perintah itu adalah perintah khusus tentang keperluan untuk penzahiran dokumen dan tidak mempunyai kaitan dengan penghakiman terus. Ketidakpatuhan perintah itu sendiri dan arahan mahkamah berhubung dokumen tersebut menyebabkan penghakiman dibuat terhadap defendan-defendan dan bukan kerana tiada merit dalam pembelaan dan tuntutan balas defendan-defendan.

Case(s) referred to:

Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd [2011] 7 CLJ 121 FC ***(refd)***

Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal [2019] 9 CLJ 153 FC ***(refd)***

Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee [2018] 1 CLJ 641 CA ***(refd)***

Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***

Wallersteiner v. Moir [1974] 3 All ER 217 ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 42

Rules of Court 2012, O. 14 r. 1, O. 24, O. 34, O. 73 r. 5(1), O. 81 r. 1

For the appellant - Nur Irmawatie Daud & Saravanan Kuppusamy; SFCs

For the respondent: Ariff Rozhan, Christopher Arun Francis, Sylvie Tan & Nurul Farhani Kamarudin; M/s Ariff Rozhan & Co

[Editor's note: Appeal from Court of Appeal, Civil Appeal No: W-01(NCvC)(W)-898-12-2022 (overruled); Appeal from High Court, Kuala Lumpr, Civil Suit No: WA-21NCvC-16-04-2019 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Vazeer Alam Mydin Meera FCJ:

Introduction

[1] The plaintiff/respondent, Vertex Blue Consulting Sdn Bhd, is in the business of providing advertising and media services. The plaintiff was the successful bidder in a tender exercise conducted by RTM to appoint an independent sales agent to carry out the sales of the advertising time slots for its TV2, TVOkey and 33 radio stations ("tender exercise"). RTM comes under the purview of the defendants/appellants.

[2] The parties then entered into a concession agreement dated 4 July 2017 for a period of five years ("concession agreement").

[3] The plaintiff claimed that the defendants in breach of contract had wrongly terminated the concession agreement. Thus, the plaintiff filed a suit in the High Court seeking, *inter alia*, a declaration that the concession agreement was wrongly terminated, and claiming damages based on losses it had allegedly suffered.

[4] The defendants denied the breach of contract and alleged that it was the plaintiff who had in fact breached the concession agreement by failing to pay the contractually guaranteed minimum sum. Thus, the defendants contended that the termination of the agreement was lawful, and counterclaimed the sum of RM43,482,881.27 as damages.

The High Court Discovery Orders

[5] At the High Court, the plaintiff filed two applications under the Rules of Court 2012 for discovery of documents, which may be categorised as:

(i) a general discovery application; and

(ii) a specific discovery application for six categories of documents.

[6] A consent order for general discovery was recorded on 15 October 2019, and the specific discovery application was granted on 4 February 2020.

[7] The defendants cooperated and gave discovery of the documents sought. The defendants in fact arranged for the plaintiff to be present at the RTM premises for the purpose of inspection and production of the documents sought. However, the plaintiff complained that the defendants' compliance with both orders was incomplete and unsatisfactory. Consequently, the plaintiff filed a further discovery application on 8 July 2021, seeking additional documents from the six categories specified earlier. This application was granted on 12 October 2021 ('order').

[8] In the order, para. 6 was an unless order ('the unless order') which stated as follows:

> (6) that unless the Defendants comply with the Orders made herein, the Defendants' Defence and Counterclaim in this Suit dated 28.2.2019 and filed herein, shall stand struck out without further Order of Court and the action herein shall be adjudged in the Plaintiff's favour with the requisite Orders and/or Judgment entered as prayed for by the Plaintiff.

[9] Subsequently, although further documents were provided on 19 November 2021, the plaintiff contended that the defendants were still in breach of the order by failing to fully comply with its terms. Thus, on the first day of trial, the plaintiff sought an adjournment, and when it was not allowed by the court, counsel then raised the issue of the defendants' non-compliance of the order and sought default judgment as per the terms of para. (6) of the order.

[10] Having heard oral submissions of the parties on 17 November 2022, the learned High Court Judge (HCJ) ordered as follows:

(i) a declaration that the termination of the concession agreement dated 4 July 2017 *via* the termination notice dated 10 December 2018 is unlawful;

(ii) general and/or special damages to be assessed by the court;

(iii) the defendants' amended defence and the defendants' counterclaim dated 27 October 2022 be struck off; and

(iv) costs of RM15,000 to be paid by the defendants to the plaintiff.

[11] The learned HCJ, made the following findings:

(i) the plaintiff requested the court to adjourn the trial to allow parties to further discuss and identify the documents that remain to be furnished. However, the HCJ denied this request, noting that the case was filed in 2019 and more than three years have passed without a resolution. The plaintiff was directed to call its first witness. However, counsel for the plaintiff submitted that the defendants had failed to fully comply with the order, and as such, their defence and counterclaim must be struck out;

(ii) as specified in para. 6 of the order, non-compliance by the defendants will result in their defence and counterclaim being struck out without further order of the court. In such an event, judgment will be entered in favour of the plaintiff in accordance with the plaintiff's statement of claim;

(iii) the plaintiff also asserted that it had sent three letters to the defendants, informing them of their failure to comply with parts of the order. Despite these communications, the defendants had not responded. The defendants have acknowledged their non-compliance and the resulting delay. Their failure to comply with the order leads to the automatic striking out of their defence and counterclaim; and

(iv) the HCJ, guided by the Federal Court's decision in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557, reaffirmed that a peremptory order must be strictly adhered to, and non-compliance will result in the striking out of the action.

At The Court Of Appeal

[12] Dissatisfied with the decision of the High Court, the defendants appealed to the Court of Appeal ("COA").

[13] On 20 June 2024, the COA dismissed the appeal and affirmed the decision of the learned HCJ dated 17 November 2022.

[14] In dismissing the defendants/appellants' appeal, the COA made the following findings:

(i) the defendants' grounds of appeal focused wrongly on the discovery process rather than the core issue, that their defence and counterclaim had been struck out due to non-compliance with the order;

(ii) the High Court's judgment was correctly based on para. 6 of the order, which was a "self-executing" order, meaning that upon non-compliance, the defendants' defence and counterclaim would be struck out automatically and judgment would be entered for the plaintiff;

(iii) the learned HCJ acted within his discretion in refusing to adjourn the trial, and this could not be a ground for setting aside the judgment;

(iv) the COA emphasised that all court orders, even if irregular or inconvenient must be complied with unless set aside or varied. Ignoring them undermines the authority of the judiciary;

(v) the defendants failed to legally challenge the validity or effect of the "self-executing" unless order, and thus, the appeal was found to be without merit; and

(vi) the High Court Judge correctly applied the law in striking out the defence and entering judgment for the plaintiff, and the appeal was accordingly dismissed.

Federal Court Appeal

[15] The Federal Court granted leave to the appellants/defendants to appeal on one question of law, namely:

> Whether the trial judge was bound by the unless order pronounced by the Interlocutory Proceeding Judge when the unless order has the similar effect as though a Summary Judgment or Judgment in Default was entered against the Appellants wherein it fails to comply with the provision of Order 73 of the Rules of Courts 2012 and Section 42 of the Government Proceedings Act 1956.

[16] The Court of Appeal had in its judgment stated that the High Court had correctly applied the law in entering default judgment for the plaintiff, which was primarily a declaration to the effect that the termination of the concession agreement was unlawful. I am, with the greatest of respect, unable to accept that finding of the Court of Appeal as being correct in law.

[17] A default judgment in the form of a declaration typically cannot be made without the court considering the merits of the case. Unlike claims for a fixed amount of money, where default is an admission of the debt, claims for non-monetary relief like declarations are discretionary. Courts generally do not grant declaratory relief in default without an evidential basis and

argument to support the claim, as doing so without the court's sanction and review of the facts may be seen as a denial of procedural fairness. In essence, the court acts as a safeguard when a claimant seeks a declaration *via* default or summary judgment, requiring a substantive review to ensure the relief is appropriate and just, rather than simply rubber-stamping the request.

[18] Declarations are a form of specific relief, which is subject to the court's discretion, even if the defendant has not responded to the claim. A standard default judgment is not considered a judgment "on the merits" in the sense of a full trial. Thus, for declaratory relief, the court will require some level of scrutiny of the merits of the claim before making the order. The claimant must provide evidence of the factual matrix to enable a judge to exercise his discretion properly. The court needs to be satisfied that the claimant's case is a fit one for granting the specific relief sought. If a default judgment is entered irregularly (without following proper procedure), it can be set aside as a matter of right.

[19] This principle was reiterated by the Federal Court in *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121; [2011] MLJU 507. In that case, the Federal Court was posed the following question of law:

> Whether an application for a declaratory judgment in default of defence pursuant to Order 19 r. 7(1) of the Rules of the High Court 1980 must be supported by evidence of the factual matrix to enable a judge to exercise his discretion in granting or refusing the declaratory relief prayed for?

[20] In answering that question, Richard Malanjum CJSS (as he then was) in speaking for the court held as follows:

> As declaration was the main prayer of the Respondent it is a rule of practice that before such relief is granted there must be evidential basis to do so. Courts are very slow in granting declaratory prayer without any evidence and argument advanced.
>
> In *Gan Boon Kyee v. Yap Hong Sin & Anor* (1997) 2 MLJ 598 the Court of Appeal said this at page 601:
>
> > I have read the judgment of the learned judicial commissioner with great care, bearing in mind that **this is not the case of an ordinary judgment in default but one of declaratory relief.** As observed by Zamir & Woolf on *The Declaratory Judgment* (2nd Ed) at p 264:
> >
> > > … courts will generally be reluctant to grant a declaration as part of a default judgment in the absence of any evidence and argument. Before the court grants a declaration, it wants to be sure, as in the case of an injunction, that it is appropriate to grant that relief. per Gopal Sri Ram JCA (as he then was).

We are inclined to agree with the *dicta* in the above mentioned case. In fact it is a rule of practice that 'the court does not make declarations of right either on admissions or in default of pleading' and the rule is quite entrenched as observed in the case of *Patten v. Burke Publishing Co* [1991] 2 All ER 821. This is what Millet J said:

> It is not the normal practice of this division to make a declaration when giving judgment by consent or without a trial as in the case of a judgment in default of defence or of notice of intention to defend the proceedings. That is a practice of very long standing. It was confirmed in *Wallersteiner v. Moir* [1974] 3 All ER 217; [1974] 1 WLR 991. In that case the claim, which was contained in a counterclaim, sought a declaration that the plaintiff had been guilty of fraud, misfeasance and breach of trust. The judge granted the declaration in default of the defence and the Court of Appeal struck it out. Buckley LJ said ([1974] 3 All ER 217 at 251, [1974] 1 WLR 991 at 1029):
>
> > It has always been my experience, and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in *Williams v. Powell* [1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence. If declarations ought not to be made on admissions or by consent, a *fortiori* they should not be made in default of defence, and a *fortissimo*, if I may be allowed the expression, not where the declaration is that the defendant in default of defence has acted fraudulently. Where relief is to be granted without trial, whether on admissions or by agreement or in default of pleading, and it is necessary to make clear on what footing the relief is to be granted, the right course, in my opinion, is not to make a declaration but to state that the relief shall be on such and such a footing without any declaration to the effect that that footing in fact reflects the legal situation.

Scarman LJ gave judgment to the same effect but in somewhat different terms. He said ([1974] 3 All ER 217 at 253, [1974] 1 WLR 991 at 1030):

> There was of course a strong objection to the inclusion of the declaration sought in that case. Even after trial it is not the normal practice of the court to make a declaration that the defendant had been guilty of fraud or negligence. Justice can be done to the plaintiff by awarding him damages. If he wishes to parade the basis upon which damages have been awarded to him, he has a judgment which he can produce. The judgment will contain the

A findings of fraud or negligence upon the basis of which the damages have been awarded, and that should be sufficient for the plaintiff's purpose. But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. Quite
B apart from this, however, it is clear from *Wallersteiner v. Moir* that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration. (emphasis added)

C **[21]** Now, it is very clear that in the present case, the default judgment containing the declaratory order was made without the benefit of any evidence on which the High Court could have properly exercised its discretion. Hence, applying the *dicta* of this Court in *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd*, I am of the considered view that the default judgment
D granted summarily is not a proper judgment on its merits, as was noted by Scarman LJ in *Wallersteiner v. Moir* [1974] 3 All ER 217; [1974] 1 WLR 991:

> But in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had
E the facts been investigated.

[22] Hence, to that extent, I find that the Court of Appeal and the High Court have fallen into error. The judgment of the High Court is irregular, and the Court of Appeal's affirmation of that judgment is wrong in law. In the circumstance, in the absence of any supporting evidence, the trial judge was
F not bound by the terms of the order to grant default judgment on the basis of mere non-compliance of the order.

[23] In the circumstance of the facts of this case, the leave question is answered in the negative.

G **[24]** My learned sister Hasnah binti Mohammed Hashim, CJM, has read this judgment in draft and has agreed with the same.

[25] Wherefore, we would allow the appeal and set aside the judgment and order of both the High Court and Court of Appeal. The matter is remitted to the High Court for trial.

H **Abu Bakar Jais PCA (Dissenting):**

Introduction

[26] The appellants before us were the defendants at the High Court ("HC") and the respondent was the plaintiff at the same court. I shall hereafter refer
I the said parties as they were at the HC. Judgment was entered for the plaintiff

at the HC and the Court of Appeal ("COA"), subsequently dismissed the defendants' appeal and affirmed the HC's decision. The Federal Court later gave leave to appeal for the defendants based on a single question of law that reads:

> Whether the trial judge was bound by the unless order pronounced by the Interlocutory Proceeding Judge when the unless order has the similar effect as though a Summary Judgment or Judgment in Default was entered against the Appellants wherein it fails to comply with the provision of Order 73 of the Rules of Court 2012 and Section 42 of the Government Proceedings Act 1956.

[27] Thus, the crux of the appeal before this court concerns a narrow issue, *ie*, can the non-compliance of a court order by the defendants mean that a final judgement can be entered against them as government parties despite certain legislations as seen above.

Brief Facts

[28] The facts pertaining to matters arising as basis for the claim itself are far less important compared to what transpired in court between the parties in preparation for the trial at the HC. Nonetheless, for context, the minimum relevant facts arising before the statement of claim was filed by the plaintiff can be stated as follows.

[29] The plaintiff entered into a concession agreement titled "Perjanjian Perkhidmatan Penjualan Masa Siaran Iklan Radio Televisyen Malaysia (RTM) Bagi Tempoh Lima Tahun" dated 4 July 2017 ("concession agreement"). The plaintiff claimed that the defendants breached this concession agreement and had wrongly terminated the same. The plaintiff therefore claimed damages against the defendants.

[30] On the other hand, the defendants claimed that it was the plaintiff that had breached the terms of the concession agreement and therefore the same was rightly terminated. Hence, the defendants counterclaimed against the plaintiff.

[31] The case then was fixed for full trial before the HC.

At The HC

[32] In view of the application of the plaintiff before full trial in an interlocutory proceeding, the HC through the learned judge hearing the same, had ordered and directed the defendants to disclose and provide the plaintiff with some documents that were or had been in the defendants' possession ("order") but were not previously provided by the defendants in an earlier discovery order. The order stipulates these documents must be provided within 14 days of the same.

[33] This order also stated that if the defendants do not comply with the same, their amended defence and counterclaim will be struck out without further order of the court and the action herein will be adjudicated in favour of the plaintiff with the requisite orders and judgment entered in accordance with the plaintiff's statement of claim. In short, this is commonly referred to also as an 'unless order'.

[34] There is no evidence suggesting that the defendants had complied with this order.

[35] Instead, the defendants maintained this order could no longer be relied by the plaintiff as the same had waived its right to enforce the unless order. This is because the plaintiff had asked for the trial to be postponed. The plaintiff also had amended its statement of claim which gives the impression that the defence is still valid. In addition, the plaintiff had also filed its reply in response to the amended defence.

[36] The plaintiff in response, submitted none of the above reasons given by the defendants could mean that the former had waived its right to rely on the order for its benefit. In fact, it had reserved its right to proceed with the order when necessary.

[37] The HC on the date of trial, decided through the learned Judicial Commissioner who acted as the trial judge, that the order is still good for the plaintiff and that the non-compliance of the same by the defendants would only mean that the amended statement of defence and counterclaim could not stand as the order stated the amended defence and counterclaim will be struck out without further order of the court, and the action herein will be adjudicated in favour of the plaintiff with the requisite orders and judgment entered in accordance with the plaintiff's statement of claim if the documents were not disclosed. There is also no appeal lodged by the defendants against the order made.

[38] Essentially, the learned Judicial Commissioner gave effect to the order made by the learned judge.

[39] As a consequence, the HC granted the plaintiff as requested, a declaration that the termination of the concession agreement by the defendants is unlawful, damages and costs. That effectively means that final judgement was entered for the plaintiff against the defendants.

At The COA

[40] The defendants went before the COA for the appeal against the decision of the HC, but essentially the COA found that the order was clear, unequivocal and unambiguous requiring the defendants to obey the same. Failure by the defendants to comply with the terms of the order according to the COA, meant that the HC was correct to enter judgment against the defendants.

[41] Further, the COA found that non-compliance of the order resulted in the amended defence and counterclaim by the defendants being rightly struck-out. The COA was of the view that all court orders must be obeyed and those who ignored them, do so at their own peril.

Question Of Law

[42] Having noted the question of law posed for the present appeal as narrated earlier, several features stand out in the same and they are as follows:

(i) the question is posed whether the trial judge (the Judicial Commissioner) must follow the order made by the learned judge (the interlocutory proceeding judge) before the date of the trial;

(ii) the defendants equate the order similarly as a summary judgment or judgement in default; and

(iii) such judgement could not be entered against the defendants as it contravenes O. 73 of the Rules of Courts 2012 and s. 42 of the Government Proceedings Act 1956.

Order 73 Of The Rules Of Court 2012 And s. 42 Of The Government Proceedings Act 1956

[43] In its written submission for the appeal before this court, the defendants cited and focused on O. 73 of the Rules of Court 2012 ("ROC"). This provision is about proceedings by and against the government. Specifically, the defendants referred to O. 73 r. 5(1) of the ROC that states as follows:

> An application against the Government shall not be made under Order 14, rule 1 or Order 81, rule 1 in any proceedings against the Government nor under Order 14, rule 5 in any proceedings by the Government.

[44] In turn, the above O. 14 r. 1 states as follows:

> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the court for judgment against that defendant.

[45] Essentially O. 14 r. 1 stated above allows for summary judgment to be entered. This would mean the normal trial would be dispensed with and judgment can be entered before trial properly.

[46] While O. 81 r. 1 also stated above, speaks about judgment could be entered if there is no defence for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages. Order 81 r. 1 states as follows:

> (1) In an action begun by writ endorsed with a claim:
>
> (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;
>
> (b) for rescission of such an agreement; or
>
> (c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defence to the action, apply to the court for judgment.

[47] While in respect of s. 42 of the Government Proceedings Act 1956 ("GPA"), this provision essentially is about proceedings by and against the government including cases pertaining to summary judgment.

The Defendants' Submission

[48] In gist, the defendants argued that both the above provisions are subjected to O. 73 r. 5(1) of the ROC as narrated earlier which disallows summary judgment against the government.

[49] In this regard, the defendants equate the order given by the learned judge for the disclosure of the documents and the unless order given to enter judgment against the defendants in the event that the documents are not disclosed, as a summary judgement against the defendants. Therefore, according to the defendants, when judgment was entered against them by the learned Judicial Commissioner, in view of the order, the HC went wrong as O. 73 r 5(1) of the ROC, as stated above, prohibits summary judgement against government including the defendants.

The Plaintiff's Submission

[50] In summary, the plaintiff contended that the order is legal and binding including on the learned Judicial Commissioner as the trial judge. The Judicial Commissioner had used his discretion correctly to give effect to the order. It is a court order that must be followed unless set aside. There is also no appeal by the defendants when the order was made. This indicates they accepted the same.

[51] The order is clear that if it is not obeyed, the defence and counterclaim will be struck out without further order of the court and judgment will be entered in accordance with the plaintiff's statement of claim. Compliance of the order was therefore crucial by the defendants with serious consequences if it is not obeyed.

[52] The plaintiff did not waive it rights to the order. In fact, the plaintiff wrote letters to the defendants reminding them to disclose the documents as required by the order.

Decision

[53] The order could not be equated as summary judgment as submitted by the defendants. The order made has a clear distinction compared to a summary judgment. The order was made as preliminary direction given for the disclosure of the documents before full trial. While a summary judgment is granted by evaluating the pleadings to conclude there is no defence to the claim filed. The order was made even before the need to evaluate the defence. The non-compliance with the terms of the order by the defendants resulted in judgment being entered against them. It does not require the evaluation of the defence. That is precisely with respect why the defendants are in error to consider the order as similarly as a summary judgment,

[54] It could not be correct law to say the defendants are absolved from liability because they are Government entities and as such, no judgment could be entered against them as it amounts to summary judgment against the Government in this case. The judgment must be entered against the defendants as they had simply disobeyed the order which includes the unless order. It has no nexus with a summary judgment.

[55] The action of the defendants in not complying with the terms of the order is quite clear. If the unless order is not given effect, the defendants not only could avoid obligation to disclose the documents, but also has the effect of allowing the defendants to ignore the directions of the courts. This among others would directly hamper and frustrate the ability for courts to issue directions to properly manage the case before the trial as provided by O. 34 of the ROC for pre-trial case management. It is common knowledge that the courts now have increasing cases for disposal and this provision is a fundamental tool for the courts in managing these cases before trial. This includes giving pre-trial directions such as in the present appeal for the production of the documents by the defendants as required by the order.

[56] Further, there can be no doubt that the order is a binding court order issued in the ordinary course of court proceedings. The order thus must be obeyed and any judgment or ruling to the contrary will not only invite disrespect to directions issued by the courts by such orders but also gives the damaging impression that there are instances that court orders need not be complied with. In this regard, it is also relevant to note that the Federal Court in the case of *Ann Joo Steel Bhd v. Pengarah Tanah Dan Galian Negeri Pulau Pinang & Anor And Another Appeal* [2019] 9 CLJ 153; [2019] 5 MLRA 553 said:

A [65] The fundamental principle which is pivotal in all these decisions, is that the sanctity of a Court Order must at all times be observed, and a party bound by that order of a court has no business deciding for himself that a binding Order of a court need not be observed because in his view it is not valid. If court orders are allowed to be ignored with impunity, it will ruin the authority of judicial order, which is the core of all judicial B systems. In line with our jurisprudence, court orders must be respected and complied with. There will be no end to litigation if parties are allowed to determine for themselves that any order of the court would be observed or otherwise.

[66] It is, therefore, a long established principle of law that one may apply C to set aside an order of a superior court but it must be made in a direct and specific proceeding filed for that purpose be it in the same proceedings or a separate one. It cannot be contested merely by raising it as defences in a suit as being undertaken in these appeals. The underlying reason for this legal jurisprudence to be adhered to, is not difficult to appreciate. It is to preserve the sanctity as well the finality of an order of court. We D therefore do not find any reason to depart from all these earlier decisions on this particular point.

[57] In the present case before us, not only the order was not set aside in any proceedings but the defendants also did not appeal against the grant of the same. The effect of not appealing meant that the defendants accepted the E terms of the order. A case in point regarding the failure to appeal is this court's decision in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 MLRA 181 which among others dealt with the order at the lower court to strike out the suit. Similarly, there was no appeal against this order to strike out. This court hence said:

F [20] We also find that the plaintiff did not appeal against the decision of the learned judge striking out the first suit. The failure to appeal meant that the plaintiff accepted the correctness of the decision to dismiss its suit. Further, the failure to appeal has itself been recognised as an abuse of process because the second suit would be construed as an attempt to G circumvent the appeal procedure.

[58] The unless order contained in the order itself is also unambiguous in stating if the order is not adhered to, the defendants' amended defence and counterclaim "shall stand struck out without further order of court and the action herein shall be adjudged in the plaintiff's favour". Thus, it is H self-executing in nature and the failure to comply with the order, should mean the defendants must face the consequences and penalty that accordingly ensued. In this regard, Mohd Zawawi Salleh JCA (as he then was) in *Hup Soon Omnibus Co Sdn Bhd & Anor v. Lim Chee* [2018] 1 CLJ 641 said:

[12] Before parting with this appeal, we would like to emphasise that a I court order is a court order. It must be obeyed as ordered unless set aside or varied. It is not a mere technicality that can be ignored. If we allowed court orders to be ignored with impunity, this would destroy the authority

of judicial orders which is the heart of all judicial systems. We hold a firm view that a court order is not a mere technical rule of procedure that can be simply ignored. In our jurisprudence, court orders must be respected and complied with. Those who choose to ignore them do so at their own peril.

[59] I am also of the opinion that the order was made pursuant to an application from the plaintiff by virtue of O. 24 of the ROC for the discovery of the documents and we consider this provision is specific in nature. This is in contrast to O. 73 of the ROC which is more of a general provision relied by the defendants on proceedings by and against the government. Hence, the principle of '*generalia specialibus non derogan*t' ("general things do not detract from special things") would thus apply against the defendants. In this sense, the application regarding the disclosure of the documents must take precedence over the issue of whether summary judgement had been entered against the defendants.

[60] I am also of the view that s. 42 of the GPA as noted earlier would not assist the defendants in the present appeal as the order is a specific order about the requirement to disclose the documents and has no or little connection with a summary judgment. The non-compliance of the order itself and the court's direction regarding the documents resulted in judgment being entered against the defendants and not because there are no merits to the defence and counterclaim of the defendants.

Conclusion

[61] Based on all the foregoing, I would answer the question of law by saying the trial judge was bound by the unless order pronounced by the interlocutory proceeding judge but I do not agree that the unless order has similar effect as though a summary judgment or judgment in default was entered against the defendants.

[62] The appeal is hereby dismissed.